

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Comprehensive Review of the Universal |) | |
| Service Fund Management, Administration, |) | WC Docket No. 05-195 |
| and Oversight |) | |
| |) | CC Docket No. 96-45 |
| Federal-State Joint Board on Universal |) | |
| Service |) | CC Docket No. 02-6 |
| |) | |
| Schools and Libraries Universal Service |) | |
| Support Mechanism |) | WC Docket No. 02-60 |
| |) | |
| Rural Health Care Support Mechanism |) | WC Docket No. 03-109 |
| |) | |
| Lifeline and Link-Up |) | CC Docket No. 97-21 |
| |) | |
| Changes to the Board of Directors for the | | |
| National Exchange Carrier Association, Inc. | | |

**PETITION FOR CLARIFICATION, OR IN THE ALTERNATIVE,
RECONSIDERATION**

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SUMMARY

Cincinnati Bell Telephone Company LLC (“CBT”) requests that the Commission clarify its new Universal Service Fund (“USF”) late fee assessment practice is not intended to impose late fees back to the date payment should have been made when a contributor timely submits a report, timely pays contribution, and subsequently submits a revised report to resolve inadvertent under-reporting. An unfair financial penalty would result if the Commission sought to impose the late fee assessments on such contributors. Moreover, because the Wireline Competition Bureau has limited to one year the ability for contributors to revise reports that result in decreased contributions, inequity would result should the Commission decided to impose late fee assessments back to the date payment should have been made on those reports that result in increased contributions.

Alternatively, CBT requests that the Commission reconsider its decision, and at a minimum, limit the assessment of interest back to October 24, 2007, the date the new practice takes effect. In addition, the Order should apply only to those companies that are not invoiced or fail to pay invoices. Companies who file and pay timely and subsequently revise their worksheets should not be penalized for such revisions. Imposing an interest assessment prior to October 24, 2007 would be an improper retroactive application because a new obligation would be created that was not in effect at the time of the contributor’s initial filing and contributors have relied on the existing USAC practice when filing revised reports.

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I. INTRODUCTION

Cincinnati Bell Telephone Company LLC (“CBT” or “Company”), by its attorneys and pursuant to Section 1.429(a) of the Commission’s rules, respectfully petitions the Commission to clarify, or in the alternative reconsider, certain aspects of its Report and Order, FCC 07-150, released August 29, 2007, in WC Docket 05-195 (the “*Order*”).¹ CBT is an interested party because it is an incumbent local exchange carrier that contributes to the Universal Service Fund (“USF”).

¹ *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight; Federal-State Joint Board on Universal Service; Schools and Libraries Universal Service Support Mechanism; Rural Health Care Support Mechanism; Lifeline and Link-up; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.*, Report and Order, FCC 07-150, WC Docket Nos. 05-195, 02-60, 03-109 and CC Docket Nos. 96-45, 02-6, 97-21 (rel. Aug. 29, 2007) (“*Order*”).

In the *Order*, the Commission altered the manner in which the Universal Service Administrative Company (“USAC”) is to calculate and impose late filing fees, late payment fees and interest on delinquent contributions. CBT understands the Commission’s actions to the extent that they are designed to punish companies who consciously disregard either their USF contribution obligations or underpay their USF invoices. But, CBT believes that the *Order* lacks sufficient detail for USAC to implement it in practice, including transition to these new fees, and to put carriers on notice of how these fees and penalties will be imposed in certain practical instances.

It appears that the FCC intends for the new, Debt Collection Improvement Act (“DCIA”) based interest rate to apply only after the effective date of the *Order*. CBT respectfully requests that the Commission clarify that the *Order* was not intended to alter the past consequences of past actions or inactions of companies. This can be accomplished by clarifying that the new interest rate will accrue beginning on the effective date of the *Order*.

Further, the Commission should clarify that the prospective nature of the rule applies equally for both currently invoiced USF charges as well as any un-invoiced USF charges. That is, USF charges that have not been invoiced by USAC as of the effective date would also not accrue interest at the new DCIA-based rate until the effective date of the *Order*. Similarly, the Commission should clarify that it differentiates between carriers who either fail to pay or report, or underpay invoiced charges, and carriers who pay invoiced charges timely and later revise their worksheets and are invoiced additional charges through routine revisions or the true up process.

In the event that the Commission is unable to clarify the *Order* in the manner described above, then CBT petitions, in the alternative, that the Commission reconsider the *Order* to ensure that it cannot be used to impose retroactive interest or penalties prior to the effective date or interest or penalties on revised worksheets. Assessment of the new interest charges for any

period of time prior to the effective date would constitute a retroactive rulemaking and be unlawful. Further, such an assessment would be unequal and discriminatory in violation of Section 254 of the Act.

II. ARGUMENT

A. Portions of the *Order* Are Ambiguous and Should Be Clarified

In the *Order*, the Commission adopted a new late fee and interest assessment practice that imposes late fees back to the date payment should have been made, even if the carrier did not receive an invoice from USAC.² The Commission did not address whether it intended its practice to apply prospectively or retroactively.³

USAC's current late fee assessment practice imposes late fees (in lieu of interest) from the due date of an invoice, regardless of the time period being invoiced.⁴ The FCC recognized this well-established administrative practice in the *Order* and is described in greater detail on USAC's publicly-available website.⁵ For example, if a contributor had timely reported 2004 revenue, received invoices from USAC based on that revenue, and filed an upward adjustment to that revenue in 2007, USAC would only assess late payment fees from the 2007 invoice due date, if the invoice was not timely paid. As a result, contributors are not unduly penalized for filing a revised form to adjust any inadvertent under-reporting.

² *Order* at ¶ 14. The Commission states that USF contributions are required even if an invoice or advance billing notice is not issued by USAC. *Order* at ¶ 10.

³ By contrast in a recent order regarding the regulation of prepaid calling cards, the Commission specifically made a portion of the ruling retroactive and specifically declined to apply retroactive applicability to another portion of the order. *Regulation of Prepaid Calling Cards Services*, Declaratory Ruling and Report and Order, FCC 06-79 (rel. June 30, 2006) (appeal pending).

⁴ *Order* at ¶ 11.

⁵ See, <http://www.usac.org/fund-administration/contributors/understanding-your-invoice/billing-dispute-procedures.aspx>; (describing dispute procedures and possible interest); see, also, http://www.usac.org/_res/documents/fund-administration/pdf/USAC%20Invoice%20Description.pdf (sample invoice showing late payment fee).

USAC applied this assessment practice equally to those carriers that under-reported revenue and those carriers that failed to report any revenue to USAC. The Commission has stated that it intends to change this assessment process going forward to incent those carriers that ignore their USF obligations (either by failing to file Forms 499 or failing to pay USAC's invoices) to meet such obligations. However, the Commission should clarify that it will not alter USAC's well-established practice retroactively.

This clarification is especially important in instances where a contributor has timely submitted a Form 499-A, timely paid its contribution billed by USAC, and subsequently submitted a revised report to adjust unintentional and inadvertent under-reporting. If the Commission were to apply retroactive interest back to the date the revised payment would have been made, carriers would have no incentive to review and revise their USF revenue reporting. To the contrary, carriers would likely not review their USF reporting unless an error was brought to their attention, either by USAC or other auditors. CBT does not believe this retroactive assessment of interest is what the Commission intended. In fact, the *Order* specifically discusses carriers who make no filing at all (and receive no invoice).⁶ Thus, the *Order* does not appear to contemplate penalties for carriers who make revisions to the previously filed timely forms. Because CBT does not believe this result is what the Commission intended, the *Order* should be specifically clarified to so state.

Assessing such late fees, particularly interest, would impose a substantial retroactive financial penalty on a contributor that believed in good faith that it had accurately reported and paid its contribution as invoiced. For instance, if the Commission did implement the *Order* retroactively for under-reporting, an invoice issued in January 2008 after a contributor files a revised report to adjust for unintentional under-reporting would accrue a substantial amount of

⁶ See, *Order*, at ¶14 (discussing interest calculations where no invoice is issued).

interest on the additional contribution that would begin running prior to the effective date of the Order. Such an inequitable result could not be intended by the Commission, and therefore, Cincinnati Bell requests clarification about the application of the new practice in these circumstances.

In addition to being a retroactive penalty, application of such a practice would be patently unfair considering the Commission has not yet acted to reconsider the decision by the Wireline Competition Bureau to reject revised reports submitted more than twelve months after the original filing when the revision would decrease the contribution.⁷ As discussed in the pending Petitions for Reconsideration, it is unfair to limit revisions that decrease contribution while continuing to place contributors under an indefinite obligation for increased contribution.⁸ This ruling is even more unfair if the Commission would also seek to impose substantial, potentially limitless penalties in the form of interest.

Most carriers take great efforts to keep accurate records and file accurate reports, but mistakes can occur and may not be detected until more than a year late. To require a one-sided correction of errors is unwarranted, and the inequity becomes even greater if the Commission imposes late fee assessments back to the date payment should have been made. Further, under-reporting may occur due to confusing worksheet instructions or genuine disputes between carriers and USAC on the appropriate manner to report certain types of revenue. A recent report from the Office of Inspector General summarizing a series of contributor audits, noted that only 16.09 percent of the audits resulted in an unqualified opinion.⁹ This means that nearly 85 percent of all contributors reported in manner that the auditor could not determine that the carrier had

⁷ *Federal-State Joint Board on Universal Service*, Order, 20 FCC Rcd 1012 (WCB 2004).

⁸ *Federal-State Joint Board on Universal Service*, Sprint Corporation Petition for Reconsideration, Docket Nos. 96-45, 98-171, and 97-21 (filed Jan. 10, 2005).

⁹ *Contributors to the Universal Service Support Mechanism Initial Statistical Analysis of Data from the 2006/2007 Compliance Audits*, Office of Inspector General, Oct. 3, 2007, at 3.

completely complied with its understanding of the reporting obligations. As dire as this may appear, less than 20 percent of contributors were deemed completely out of compliance; the rest will simply designated as being unable to confirm compliance.¹⁰ What this report demonstrates is that a carrier can believe it is in compliance and the auditors or USAC can disagree, or may be unable to even determine compliance. These conclusions do not demonstrate willful non-compliance, but rather could be indicative of honest confusion by carriers.¹¹

For instance, in one widely publicized example, Verizon made a substantial USF contribution in arrears for non-payment by MCI prior to Verizon's acquisition of MCI. Verizon, acting in good faith, made a USF payment and negotiated a consent decree with the Commission's Enforcement Bureau.¹² Had that USF payment occurred after the effective date of the *Order*, the Commission could not have intended that Verizon pay a substantial interest penalty extending years prior to the Effective Date of the *Order*. Accordingly, CBT requests clarification that the Commission does not intend to apply its new late fee assessment practice back to the date payment should have been made if such date is prior to the effective date of the *Order*.

B. Alternatively, the Commission Should Reconsider a Portion of the Order

If the Commission does intend to impose the new late fees prior to the effective date of the *Order*, CBT requests that the Commission reconsider its decision. The Commission should not charge any interest to contributors that file revised reports, or at a minimum, the Commission should limit the assessment of interest back to October 24, 2007, the effective date of the *Order*, for contributors that have under-reported. This category of contributors would include both

¹⁰ *Id.*

¹¹ This confusion can come from many sources, including unclear instruction or regulations, or conflict between Commission Order, regulations and the Form 499-A instructions, particularly when the instructions are amended without undergoing the rigors of notice and comment as required by the APA.

¹² *In the Matter of Verizon*, Order, FCC 07-122, File No. EB-06-IH-0827 (rel. July 3, 2007).

contributors that have been invoiced by USAC but have previously paid their invoiced contribution as of the effective date and those that may be invoiced in the future. Not only is reconsideration justified because an undue substantial financial penalty would be imposed upon a contributor that has acted in good faith, but imposing an interest assessment prior to October 24, 2007 would be an improper retroactive assessment.

1. Accruing Interest Prior to the Effective Date of the Order Is Impermissible Retroactive Rulemaking.

Courts have drawn a distinction between agency decisions that “substitut[e]...new law for old law that was reasonably clear,” and those that are merely “new applications of existing law, clarifications, and additions.”¹³ Where substitution occurs, the new law may be given prospective-only effect to “protect the settled expectations of those who had relied on the preexisting rule.”¹⁴ In other words, a decision that “attaches new legal consequences to events completed before its enactment,” such as increasing a party’s liability for past conduct, creating a new obligation, or imposing a new duty with respect to transactions already completed, is a substitution of an old law and may only be applied prospectively.¹⁵ An agency decision therefore cannot be applied retroactively if it “alter[s] the *past* legal consequences of past actions.”¹⁶

USAC’s current procedure for assessing late payment charges from the due date of an invoice is well-established, and as long as a contributor pays its contribution by the invoice due

¹³ *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

¹⁴ *Verizon Tel. Cos.* at 1109 (citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

¹⁵ *National Min. Ass’n v. Department of Labor*, 292 F.3d 849, 859-60 (D.C. Cir. 2002).

¹⁶ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1998) (Scalia, J., concurring).

date for revised reports, no interest accrues.¹⁷ If Commission intends the *Order* to require USAC to impose late fees back beyond the effective date of the *Order* for those contributors that inadvertently under-report, the Commission is creating a new obligation or liability that was not in effect at the time of the contributor's initial filing. Specifically, the legal landscape would be drastically changed as of October 24, 2007, because contributors that unintentionally under-report would have a new legal consequence as a result of the *Order* -- assessment of a higher interest rate and assessment of this rate back to the date payment should have been made, even if not invoiced.¹⁸ Contributors have relied on the existing USAC practice when filing revised reports, and to the extent required, the Commission should reconsider retroactive application of its new late fee assessment obligation when a contributor timely submitted its report, timely paid its contribution based on the submitted report, and subsequently submitted a revised report to adjust unintentional and inadvertent under-reporting. Contributors should not be assessed any interest for inadvertent under-reporting when contributions are paid by the invoice due date, or at a minimum, should not have interest imposed prior to October 24, 2007.

In addition, if the Commission attempts to impose the new late fee assessment obligation retroactively, contributors may seek to have the decision overturned for causing "manifest injustice."¹⁹ Courts have considered multiple factors to determine whether retroactive application of an agency decision would cause manifest injustice, including whether the new rule represents an abrupt departure from well established practice, the extent to which the party

¹⁷ *Order* at ¶ 11, fn. 27. In multiple places in the *Order*, the Commission states that its replacement of the existing practice is meant to strengthen the consequences for contributors that *fail* to timely file forms and submit invoiced payments. *Order* at ¶¶ 9-12, 14 (emphasis added). Most contributors that file revised reports would not be considered as failing to timely file forms and submit payments. In fact, taken to its logical extremes, the *Order* could be considered to apply to the annual true up, as the true up involves a comparison of previously reported revenue during the year to a final annual revenue figure at the year's end. The Commission could not have intended this rule to apply to the true up and thus could not have intended it to apply to revised worksheets as well.

¹⁸ *Order* at ¶ 14.

¹⁹ *Verizon Tel. Cos.* at 1109. (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc)).

against whom the new rule is applied relied on the former rule, and the degree of burden which a retroactive rule imposes on a party.²⁰

A contributor might demonstrate manifest injustice from retroactive application of the *Order* by pointing out that the new rule is an abrupt departure because USAC has articulated and repeatedly applied its practice of imposing interest payments on delinquent contributions based on the invoice deadline. A contributor might also show that a substantial financial burden will result by calculating the interest payments imposed under the previous USAC practice and the new rule and presenting the cost difference between the two. Further, reliance on the former rule might be shown by the fact that a contributor voluntarily submitted a modified report, which signifies the contributor did not believe the Commission would retroactively impose the new interest calculation.

For these reasons, reconsideration of the rule by the Commission would be justified to ensure prospective-only application of the *Order*. Reconsideration would also ensure contributors that have already been invoiced and those that may be invoiced in the future are not assessed interest for timely paying invoices based on revised reports or are only assessed interest, at a minimum, back to October 24, 2007.

2. Applying Interest prior to the Effective of the *Order* Violates Section 254.

Section 254(d) of the Act provides that the Commission must collect universal service funding on an “equitable and nondiscriminatory” basis. The Commission has been at pains to follow this standard and has sought where possible to set the details of its recovery mechanism – including the specifics of timing and calculation methodology – in a manner that assures that

²⁰ See e.g., *Clark-Cowlitz* at 1081-86.

carriers are treated neutrally.²¹ Historically, a carrier who timely filed an annual Form 499-A and later timely corrected the error with an amended Form 499-A would not pay interest on the amount of the error (assuming the error was an understatement) unless and until it became delinquent, which would occur only if the carrier failed to timely pay the USAC invoice generated based on the amended Form 499-A.²² It appears that the Commission may not intend a change in this part of its policy, since paragraphs 17 and 18 of the *Order* continue to stress that the due date for payment is that set forth on the relevant invoice, and that the new DCIA interest will be charged if payment is made more than thirty days thereafter.

The Commission also notes its concern, however, that inaccurate true-ups may be costing the fund the time value of money (*Order* at paragraph 12). Some parties (including USAC, who must administer this rule) may view this concern as implying that the interest accrues back to the time that payment of the deficiency would have been due if it had been on the invoice that was issued in response to the first 499-A.

Either of these results, however, would be inequitable and discriminatory. Consider the case of two carriers. Carrier A finds and corrects an error in its Form 499-A for 2004 in September of 2007. It duly submits an amended Form 499-A, is invoiced and pays the deficiency in response to the invoice prior to the effective date of the new rules. Carrier A pays no interest (not even the old rate of seven percent) on the deficiency. Carrier B is exactly parallel to Carrier A except that Carrier B does not catch the error until a month or two later, such that the invoice is not issued until after the effective date of the new rules. If the new

²¹ See, e.g., *In The Matters Of Federal-State Joint Board On Universal Service, Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc.*, Further Notice of Proposed Rulemaking and Order, CC Docket No. 96-45, FCC 00-359, 15 FCC Rcd 19,947 (2000), at para. 2; *In The Matter Of Federal-State Joint Board On Universal Service*, Report and Order and Order on Reconsideration, CC Docket No. 96-45, FCC 01-85, 16 FCC Rcd 5748 (2001)

²² Of course, in the event of a complete failure to file or of a willful misstatement on the Form 499-A, the Commission has always had the power – and used it – to sanction the offenders through enforcement actions. But this is separate from ordinary course amendments resulting from accounting errors, restatements and the like.

interest relates back as set forth in the preceding paragraph, Carrier B will pay interest not only for the time that elapses between the new rules' effective date and the time of payment (which would not in itself be discriminatory), but also for the exact same periods of "delinquency," occurring prior to the effective date, for which Carrier A paid no interest whatsoever, and which were not even defined as "delinquency" for Carrier A. This grossly disparate treatment, for the exact same time periods, of two carriers who made identical mistakes would clearly be inequitable and discriminatory.

III. CONCLUSION

CBT urges the Commission to clarify that it did not intend this result by making clear that, as to amended Form 499-As resulting from good faith errors, the new interest rates and procedures apply only to periods of actual delinquency following the effective date of the new rules and will not result in retroactive assessment of interest. In the alternative, if the Commission had intended to apply the new rules in the manner described above, CBT asks that the Commission reconsider such a decision, to assure that the new rules are applied prospectively so as to eliminate the prospect of retroactive rulemaking and inequitable and discriminatory USF contribution.



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